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No. 03-13

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, *et al.*,
Petitioners,

v.

MARIA V. ALTMANN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE JAPAN IN SUPPORT OF PETITIONERS

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BRIEF FOR AMICUS CURIAE JAPAN IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

This case asks whether the United States will retroactively subject foreign nations to new substantive principles of sovereign immunity law in cases whose underlying events occurred long before those principles were first applied or codified.[1] Amicus curiae Japan is a sovereign foreign nation

[1] Pursuant to S. Ct. Rule 37.6, Japan notes that no part of this brief was authored by counsel for any party, and no person or entity other than Japan made any monetary contribution to the preparation or submission of the brief. Pursuant to S. Ct. Rule 37.3(a), this brief is filed with the written consent of all parties, whose letters of consent have been filed with the Clerk.

that has repeatedly been subjected to suits in this country in which such retroactive application has been sought. These have included cases in which parties have sought, decades after the fact, to impose new immunity principles on Japan in order to undo and revisit diplomatic settlements of World War II claims that were negotiated against the backdrop of prior immunity law. Japan urges the Court to hold that the substantive exceptions to immunity set forth in the Foreign Sovereign Immunities Act of 1976 ("FSIA") do not apply retroactively to cases whose underlying events occurred before those exceptions were applied or codified. But at a minimum, Japan urges the Court not to adopt any rule that could undermine the diplomatic resolution of World War II claims involving Japan and its nationals—a resolution that is the cornerstone of the enduring and productive postwar relationship between Japan and the United States.

At the conclusion of World War II, Japan entered into a comprehensive treaty with the United States and forty-four other Allied nations that expressly settled all war-related claims of the signatory nations and their nationals arising out of the actions of Japan and its nationals during World War II. *See* Treaty of Peace With Japan, Sept. 8, 1951, 136 U.N.T.S. 45 (the "San Francisco Treaty"). Among other things, the Treaty expressly waives "all * * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Id.* art. 14(b). Since then, Japan has once again become an accepted member of the community of democratic nations, and has proven to be one of the United States' most important and trusted allies.

In this case, the Ninth Circuit held that the Republic of Austria and one of its instrumentalities could be sued in the United States for acts that occurred in Europe during World War II and the post-war period more than half a century ago. At the time of the acts in question, foreign sovereigns were accorded "absolute" immunity from suit in the United States.

Nevertheless, the Ninth Circuit held that the expropriation exception of the FSIA—recognized for the first time upon the enactment of the FSIA—applied retroactively to deny Austria immunity here.

Japan has a direct and substantial interest in this case because other plaintiffs have repeatedly sought to impose the FSIA retroactively against Japan, including in cases involving World War II. In *Hwang Geum Joo* v. *Japan*, 332 F.3d 679 (D.C. Cir. 2003) ("*Hwang*"), a group of foreign nationals sued Japan for acts that occurred in Asia during World War II. In *Rosen* v. *Japan*, No. 01-C-6864 (N.D. Ill. 2003), former American POWs brought a putative class action against Japan for acts that occurred in Asia during World War II. And in *Lin* v. *Japan*, 1994 WL 193948 (D.D.C. 1994), plaintiffs sued Japan to recover on debts incurred by Japan in the 1920s. In each of these cases, the plaintiffs urged retroactive application of the FSIA.

In *Hwang*, the plaintiffs invoked the FSIA's commercial activity exception to sovereign immunity. *See* 28 U.S.C. § 1605(a)(2). Distinguishing the Ninth Circuit's holding in this case, the D.C. Circuit held that the FSIA did *not* apply retroactively to events that occurred before the commercial activity exception was recognized in 1952. *See* 332 F.3d at 686. As the court held, prior to 1952 "a foreign sovereign justifiably would have expected any suit in a court in the United States * * * to be dismissed unless the foreign sovereign consented to the suit." *Id.* at 683. Japan urges the Court to reach the same result in this case. But in the unlikely event the Court were to uphold the Ninth Circuit's holding here, it should make clear—as the D.C. Circuit did in *Hwang*—that a different rule should apply to cases against Japan.

STATEMENT OF THE CASE

The Evolution of Foreign Sovereign Immunity Law. For more than a century and a half, foreign sovereigns that

did not consent to jurisdiction were accorded "absolute" immunity from suit in the United States. The principle of sovereign immunity was first articulated by this Court in *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). There, Chief Justice Marshall explained:

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station though not expressly stipulated, are reserved by implication, and will be extended to him. [*Id.* at 137.]

Over time, this Court began to view foreign sovereign immunity as a matter for judicial deference to "the practices and policies of the State Department." H.R. Rep. No. 94-1487, at 8 (1976); S. Rep. No. 94-1310, at 10 (1976). Under those practices and policies, before 1952 foreign sovereigns were invariably accorded absolute immunity by the courts of the United States in all *in personam* actions. Only in rare instances involving *in rem* proceedings against foreign vessels were foreign sovereigns denied immunity. *See, e.g.*, *The Navemar*, 303 U.S. 68, 71 (1938); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30 (1945).

In 1952, the State Department issued the so-called "Tate Letter." *See* Letter from Jack B. Tate, Acting Legal Advisor, to Acting Attorney General Philip V. Perlman (May 19, 1952), *reprinted in* 26 Dept. State Bull. 984-985 (1952). In the Tate Letter, the State Department announced a change in the United States' policy of granting immunity to foreign states. As the letter explains, the United States had long followed the "absolute" theory of immunity, under which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Id.* at 984. The State

Department, however, decided at that time to adopt the "restrictive" theory of immunity, under which a foreign sovereign is entitled to immunity "with regard to sovereign or public acts," but not "private," or commercial, acts. *Id.* *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487 (1983) (under restrictive theory, "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts").

As before, courts continued to defer to the State Department's recommendations of immunity in individual cases. Under diplomatic pressure, however, the Department often recommended immunity in cases where immunity should not have been available under the restrictive theory. Moreover, foreign nations did not always request immunity from the State Department. As a result, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations." *Id.* at 488.

In 1976, Congress adopted the FSIA to free the State Department from diplomatic pressures and to ensure a more "uniform" application of the sovereign immunity principles that had prevailed since 1952. H.R. Rep. No. 94-1487, at 7, 13; S. Rep. No. 94-1310, at 9, 12. For the most part, "the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden*, 461 U.S. at 488. Thus, under the FSIA, a foreign state is not immune from suit in the United States in any case in which the foreign state "has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1), or in certain specified cases such as those based upon "commercial activity" that has the requisite connection with this country. *Id.* § 1605(a)(2).

In addition to codifying the restrictive theory, Congress created several other new exceptions to immunity. *See, e.g.*, *id.* § 1605(a)(3), (5), § 1605(b). Of particular relevance here,

Congress established for the first time the so-called "expropriation" or "takings" exception, which denies foreign sovereigns immunity where "rights in property taken in violation of international law are in issue" in two categories of cases: (1) where the "property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," and (2) where the "property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Id.* § 1605(a)(3).

As this Court has recognized, the FSIA "provides the *sole* basis for obtaining jurisdiction over a foreign state." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (emphasis added). Under the Act, a foreign sovereign is "presumptively immune from the jurisdiction of United States courts." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). *See* 28 U.S.C. § 1604. "[U]nless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Nelson*, 507 U.S. at 355.

Proceedings Below. Respondent brought this action against Austria and the state-owned Austrian Gallery to recover six paintings expropriated by the Nazis during World War II. Respondent sought to establish jurisdiction over Austria under the FSIA's expropriation exception. Austria moved to dismiss the action on the ground that, *inter alia*, the expropriation exception does not apply retroactively to events that occurred before 1952.

The Ninth Circuit found that Austria was subject to suit, holding that the expropriation exception applied retroactively to strip Austria of immunity for acts that had occurred more than thirty years before the exception was first recognized. The court did not "reach the broad conclusion * * * that the

FSIA may be generally applied to events predating the Tate Letter." Pet. App. 11a. Instead, the court held only that *Austria* was not entitled to immunity because—in its view—Austria could not have "legitimately expected" to receive immunity for the acts at issue here. *Id.* at 15a.

SUMMARY OF ARGUMENT

The Ninth Circuit erroneously held that the FSIA's expropriation exception applied retroactively to strip Austria of immunity for acts that occurred before 1952. Under this Court's now familiar retroactivity analysis, the Court's first task is to determine whether Congress has clearly directed that the exception be applied retroactively. As other courts have held, the FSIA lacks a "clear" indication that Congress intended the expropriation exception to apply to events preceding its enactment. To the contrary, Congress has indicated that the expropriation exception—as well as the FSIA's other original exceptions—are *not* intended to apply retroactively.

Because Congress has not clearly expressed an intent to apply the expropriation exception retroactively, the Court must determine whether applying the exception to Austria in this case would have an impermissible retroactive effect. Before 1952, foreign sovereigns were invariably granted absolute immunity in *in personam* actions. Accordingly, before 1952, a foreign sovereign would reasonably have expected to receive immunity absent consent to suit. To subject a foreign sovereign to suit for acts that occurred before 1952 "would impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns." *Hwang*, 332 F.3d at 683. Thus, applying the expropriation exception here would be impermissibly retroactive.

The Ninth Circuit's contrary conclusion was based on a misunderstanding of the principles of sovereign immunity that applied before 1952. Just as today, there was no

exception to immunity for non-"friendly" foreign sovereigns before 1952. Nor had the State Department made a determination to strip Austria of immunity in suits arising from Nazi expropriations. And the fact that Austria itself had adopted the restrictive theory before 1952 is irrelevant. The determination of whether to grant immunity to a foreign nation has never turned on the law of the foreign state.

If permitted to stand, the Ninth Circuit's decision would have serious repercussions for this Nation's diplomatic relations and international comity. After World War II, the United States adopted a policy of resolving claims for war reparations through government-to-government negotiations. That policy has proved successful, as a former adversary such as Japan is now one of this Nation's most trusted and important allies. In allowing the revival of wartime claims against another ally more than fifty years after the fact—by attempting to divine what the Truman Administration might have done in the aftermath of World War II—the Ninth Circuit's decision threatens to disrupt this Nation's current diplomatic relations.

Should this Court nevertheless hold that Austria is not entitled to immunity for the acts alleged here, the Court should narrowly confine its ruling to the facts of this case. In recently holding that the FSIA's commercial activity exception did not apply retroactively to acts allegedly taken by Japan during World War II, the D.C. Circuit expressly distinguished the Ninth Circuit's decision in this case and held that its reasoning was not applicable to Japan. As the D.C. Circuit observed, the San Francisco Treaty expressly waived "all * * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." 136 U.N.T.S. at 64, Art. 14(b). To apply the commercial exception retroactively to Japan would thus upset Japan's settled expectations. Moreover, although the Ninth Circuit misconstrued the so-called *Bernstein* letter, there is, as the

D.C. Circuit noted, no "similar statement of policy regarding the alleged acts of Japan." *Hwang*, 332 F.3d at 685. Finally, whereas Austria had adopted the restrictive theory prior to 1952, Japan had not. Accordingly, in the event the Court affirms the decision below—and it should not—the Court should make clear that its ruling is limited to the facts presented here.

ARGUMENT

I. THE FSIA'S EXPROPRIATION EXCEPTION DOES NOT APPLY RETROACTIVELY TO THE EVENTS AT ISSUE HERE.

This Court has long recognized a "presumption against retroactive legislation." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994). As the Court has explained, that presumption is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* The presumption is based on "[e]lementary considerations of fairness," which dictate that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly," and that "settled expectations should not be lightly disrupted." *Id.* As the Court has made clear, the presumption against retroactivity applies equally to jurisdictional statutes, like the FSIA, which affect not only "*where* a suit may be brought," but "*whether* it may be brought at all." *Hughes Aircraft Co.* v. *United States*, 520 U.S. 939, 951 (1997) (emphasis in original).

To determine whether a statute may be applied retroactively to events preceding its enactment, this Court follows a two-step inquiry. *See Landgraf*, 511 U.S. at 280. The Court's first task is to determine "whether Congress has directed with the requisite clarity that the law be applied retrospectively." *INS* v. *St. Cyr*, 533 U.S. 289, 316 (2001). A statute may not be applied retroactively "absent a clear indication from Congress that it intended such a result." *Id.* As this Court has emphasized, "[t]he standard for finding

such unambiguous direction is a demanding one." *Id.* " '[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was *so clear* that it could sustain only one interpretation.' " *Id.* at 316-317 (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 328 n.4 (1997)) (emphasis added) (alteration in original).

If the statute lacks the requisite clarity, the Court then considers "whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. That inquiry involves "a commonsense, functional judgment about whether the new provision attaches legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321 (quotation omitted). Here, the inquiry is straightforward: Congress did not express any clear intent to apply the FSIA retroactively, and application of the FSIA's new exceptions to immunity to cases whose underlying events occurred before those exceptions were first applied or codified would unquestionably involve an impermissible retroactive application of substantive law. Accordingly, because the new exception to immunity asserted in this case cannot be applied retroactively, the lower courts lacked jurisdiction.

A. Congress Did Not Express A "Clear" Intent To Apply The Expropriation Exception Retroactively.

The Ninth Circuit assumed, without deciding, that the FSIA lacks a "clear" indication that Congress intended the expropriation exception to apply to events preceding its enactment. *See* Pet. App. 14a. As other courts have concluded, however, the requisite clarity is lacking. *See, e.g.*, *Hwang*, 332 F.3d at 685-686 ("We find no clear indication that Congress intended [the commercial activity exception] to apply to events

occurring before 1952."); *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497 (11th Cir. 1986) (agreeing that the FSIA "contain[s] no statement indicating that restrictive immunity was intended to apply to transactions that predate[] 1952"), *cert. denied*, 480 U.S. 917 (1987).

Indeed, Congress manifested its intent that the FSIA's expropriation exception—as well as the Act's other original exceptions to immunity—*not* be applied retroactively. Congress delayed the FSIA's effective date by ninety days "to give adequate notice of the act and its detailed provisions to all foreign states." H.R. Rep. No. 94-1487, at 33. *See* Pub. L. No. 94-583, § 8, 90 Stat. 2891, 2898 (1976). If Congress had intended for the FSIA's exceptions to apply retroactively, there would have been no reason for Congress to delay the FSIA's implementation to provide foreign states with "adequate notice" of those provisions.

Moreover, when Congress has wished the FSIA to apply retroactively, it has said so expressly. In 1996, Congress created a new exception to immunity for state-sponsored terrorism, and declared that it applied "to any cause of action arising before, on, or after the date of [its] enactment." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(c), 110 Stat. 1214, 1243. *See* 28 U.S.C. § 1605(a)(7). The absence of a similar express directive for the expropriation exception—as well as the FSIA's other original exceptions—further demonstrates that Congress never intended for those exceptions to apply retroactively. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Respondent may argue that congressional intent to apply the FSIA retroactively can be found in the FSIA's preamble, which states that "[c]laims of foreign states to immunity

should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in [the Act]." 28 U.S.C. § 1602. The FSIA's preambular language, however, "falls far short" of expressing a "clear" intent to apply the FSIA retroactively. *Hwang*, 332 F.3d at 686. In fact, because the term "henceforth" indicates prospectivity, courts have relied on that same language to infer Congress's intent not to apply the statute retroactively. *See Jackson* v. *People's Republic of China*, 596 F. Supp. 386, 388 (N.D. Ala. 1984), *aff'd*, 794 F.2d 1490, 1497 (11th Cir. 1986) (agreeing with district court's analysis of the FSIA). And as the D.C. Circuit observed in *Hwang*, "the most probable meaning" of the preamble is simply to make clear that all immunity determinations would thereafter be made by *courts* rather than by the State Department. 332 F.3d at 686.

Nor may the requisite congressional intent be gleaned from Congress's repeal, concurrent with the passage of the FSIA, of a provision conferring diversity jurisdiction in cases brought by United States citizens against foreign states. *See* 28 U.S.C. § 1332 (1976). As the D.C. Circuit held in *Hwang*, the repeal of diversity jurisdiction simply "cannot provide a basis * * * for altering sovereign immunity as it existed prior to 1952." 332 F.3d at 686. At that time, foreign sovereigns were entitled to absolute immunity. Thus, "[t]he most that can be said is that in enacting the FSIA the Congress intended to incorporate the doctrine of restrictive immunity into federal law, not that the doctrine be applied to events that occurred before the United States first adopted it." *Id.*

At best from plaintiff's perspective, Congress's intent is ambiguous. Such ambiguity, however, cannot satisfy the clear statement rule of *Landgraf* and its progeny, which requires "a clear indication from Congress that it intended [retroactivity]" through "statutory language that [is] so clear that it could sustain only one interpretation" *St. Cyr*, 533 U.S. at 316-317 (quotations and citations omitted).

B. Applying The Expropriation Exception To The Events At Issue Here Would Have An Impermissible Retroactive Effect.

Because Congress did not intend the expropriation exception to apply retroactively, the Court must determine whether application of the exception to the events at issue here would be truly retroactive, "*i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Contrary to the Ninth Circuit's holding, there should be no serious question that applying the new expropriation exception to this case would have an impermissible retroactive effect.

1. As discussed, before 1952 foreign sovereigns were invariably accorded absolute immunity in *in personam* actions. Thus, during that period a foreign sovereign would reasonably have expected to receive immunity absent consent to suit. *See Hwang*, 332 F.3d at 683 (before 1952, "a foreign sovereign justifiably would have expected any suit in a court in the United States—whether based upon a public or a commercial act—to be dismissed unless the foreign sovereign consented to the suit"). To apply an FSIA exception to immunity to events occurring before 1952 would therefore be contrary to "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270. *See Hwang*, 332 F.3d 683 ("application of the commercial activity exception to events that occurred prior to 1952 would impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns"); *Jackson*, 794 F.2d at 1498 ("It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later.").

Moreover, as this Court has recognized, sovereign immunity is a matter of "*substantive* federal law." *Verlinden*, 461 U.S. at 493 (emphasis added). To remove immunity for pre-1952 acts would thus also "attach[] new legal consequences to events completed before [the FSIA's] enactment," and "impair rights a [sovereign] possessed when [it] acted." *Landgraf*, 511 U.S. at 270, 280. *See Jackson*, 794 F.2d at 1497-98 ("to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns"); *Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.) ("a retroactive application of the FSIA would affect adversely the USSR's settled expectation, rising to the level of an antecedent right, of immunity from suit in the American courts") (quotation omitted), *cert. denied*, 487 U.S. 1219 (1988).

2. The Ninth Circuit nevertheless held that the FSIA's expropriation exception—recognized for the first time when the FSIA was enacted in 1976—applied retroactively to strip Austria of immunity for acts that occurred prior to 1952. In the court's view, applying the expropriation exception to such acts would not "impair rights [Austria] possessed when [it] acted," Pet. App. 14a (quotation omitted), because Austria could not have "legitimately expect[ed]" to receive immunity for conduct "associated with the atrocities of the War." Pet. App. 16a.

Japan knows of no case—and the Ninth Circuit cited none—in which *any* non-consenting foreign state was denied immunity prior to 1952 on that basis. Before 1952, foreign sovereigns were invariably accorded immunity in *in personam* actions, regardless of the conduct at issue. *See* 26 Dept. State Bull. at 984 ("According to the classical or absolute theory of sovereign immunity, *a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign*.") (emphasis added). *See, e.g., Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 138 N.E. 24,

25-26 (N.Y. 1923) (suit against Russia for expropriation of private property); *Sullivan* v. *State of Sao Paolo*, 122 F.2d 355, 359 (2d Cir. 1941) (suit against Brazil for principal and interest due on bonds); *Puente* v. *Spanish Nat'l State*, 116 F.2d 43, 45 (2d Cir. 1940) (suit against Spain for professional services rendered), *cert. denied*, 314 U.S. 627 (1941); *Mason* v. *Intercolonial Ry. of Canada*, 83 N.E. 876, 877 (Mass. 1908) (suit against Canadian railroad for personal injuries).

Indeed, even *after* the State Department's adoption of the restrictive theory in 1952, foreign sovereigns continued to receive immunity in cases, like this one, involving alleged expropriation of private property. *See, e.g., American Hawaiian Ventures, Inc.* v. *M.V.J. Latuharhary*, 257 F. Supp. 622, 626-627 (D.N.J. 1966) (granting immunity to Indonesia). *See also Wulfsohn*, 138 N.E. at 25 (describing government's expropriation of private property as "an exercise of sovereignty"); *Victory Transport, Inc.* v. *Comisaria General*, 336 F.2d 354, 360 (2d Cir. 1964) (immunized sovereign acts include "legislative acts, such as nationalization"), *cert. denied*, 381 U.S. 934 (1965). Foreign sovereigns also continued to receive immunity in cases "involving the exercise of the power of the police or military of a foreign state." *Nelson*, 507 U.S. at 362 n.5 (citing examples). Retroactively applying the expropriation exception to the events at issue here would thus plainly involve application of new principles of substantive law.

The Ninth Circuit's holding that Austria would not have received immunity for acts "associated with the atrocities of the War," Pet. App. 16a, echoes Judge Wald's dissent in *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995), which the Ninth Circuit found "persuasive." Pet. App. 11a. In her dissent, Judge Wald concluded that the violation of *jus cogens* norms—*i.e.*, "principle[s] of international law * * * accepted by the international community of States as a whole as a norm from which no derogation is permitted"—constitutes an

implied waiver of sovereign immunity under the FSIA. 26 F.3d at 1173 (quotation omitted). *See id.* at 1179. The *Princz* majority, however, soundly rejected that proposition, as has every other circuit court to address the question. *See id.* at 1174; *see also Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001); *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 245 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993).

As the *Princz* majority recognized, it is up to *Congress*, not the courts, to create new exceptions to immunity. 26 F.3d at 1174 n.1. *See also Hwang*, 332 F.3d at 686-687 (rejecting proposition).[2] Thus, even today there is no exception to sovereign immunity based on a court's subjective assessment of the egregiousness of the underlying conduct, yet the Ninth Circuit held that such an exception existed even when the United States accorded foreign nations "absolute" immunity. The Ninth Circuit erred as a matter of law.

3. In erroneously denying Austria immunity, the Ninth Circuit relied on a statement by this Court in *Verlinden*, *supra*, that, prior to 1952, immunity was accorded " 'in all actions against *friendly* foreign sovereigns.' " Pet. App. 14a-15a (quoting 461 U.S. at 486) (emphasis added by Ninth Circuit). The Ninth Circuit's reliance on that statement, however, does not withstand scrutiny.

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[2] The Ninth Circuit erroneously concluded that the *Princz* majority held that "application of the FSIA to pre-1952 conduct is not impermissibly retroactive." Pet. App. 11a. To the contrary, the majority specifically held that it "[did] not have to decide whether the FSIA applies to pre-1952 events." 26 F.3d at 1171. In *Hwang*, the D.C. Circuit revisited the issue and squarely held that the commercial activity exception does not apply retroactively to events occurring before 1952. *See* 332 F.3d at 686.

The reference to "friendly" foreign sovereigns first appears in this Court's jurisprudence in *The Schooner Exchange*. There, Chief Justice Marshall observed that "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace," and held, therefore, that sovereign immunity extended to "national ships of war, entering the port of a friendly power open for their reception." 11 U.S. (7 Cranch) at 141, 145-146. In later decisions involving *in rem* proceedings against foreign vessels, the Court continued to hold that friendly foreign sovereigns were entitled to immunity. *See, e.g.*, *Hoffman*, 324 U.S. at 34 ("Ever since *The Exchange* * * *, this Government has recognized [the] immunity from suit[] of a vessel in the possession and service of a friendly foreign sovereign."); *Ex Parte Republic of Peru*, 318 U.S. 578, 588 (1943) ("courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations").

This Court's decisions thus stand for the unremarkable proposition that United States courts might not have declined to exercise jurisdiction over a vessel or other property of a foreign sovereign with which the United States was at war. But those cases do not suggest that the United States would have denied immunity in an *in personam* action against a non-friendly nation. Japan knows of *no* case prior to 1952 in which a non-friendly foreign nation was denied immunity in an *in personam* action. Indeed, in at least one case, a court *rejected* the argument that *in personam* jurisdiction could be exercised over a foreign state (Russia) because it was not "friendly" and had not been recognized by the United States. *See Wulfsohn*, 138 N.E. at 25 (distinguishing between actions involving "title to property situated within the jurisdiction of our courts" and actions where "[t]he government itself is sued for an exercise of sovereignty within its own territories").

Nor is it surprising that there would be no case denying immunity to a unfriendly nation in an *in personam* action prior to 1952. As a practical matter, an *in personam* suit could not have been brought against a warring nation until normal diplomatic relations had resumed. At that time, however, considerations of "grace and comity" would have required the State Department to recommend immunity. *Verlinden*, 461 U.S. at 486. In the absence of State Department precedent to the contrary, the courts would not have created an exception to immunity on their own. *See Hoffman*, 324 U.S. at 35 ("It is therefore not for the courts * * * to allow an immunity on new grounds which the government has not seen fit to recognize."). Notably, the FSIA contains no blanket exception for "unfriendly" nations. Once again, the Ninth Circuit would ascribe to the "absolute" theory of immunity an exception that not even the far more "restrictive" FSIA recognizes today.

4. The Ninth Circuit also mistakenly relied on the "*Bernstein* letter," invoked by the Second Circuit in *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 375-376 (2d Cir. 1954). *See* Pet. App. 16-18a. In *Bernstein*, the plaintiff sued a private Dutch corporation to recover commercial property originally seized by the Nazis. *See Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 173 F.2d 71, 72-73 (2d Cir. 1949). Applying the act of state doctrine, the Second Circuit refused to "pass on the validity of acts of officials of the German government." 210 F.2d at 375.[3]

[3] The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). As this Court has recognized, the act of state doctrine and the doctrine of foreign sovereign immunity are distinct. The latter concerns a court's authority to assert jurisdiction over a foreign sovereign; the former concerns a court's authority to pass on the validity of a foreign sovereign's acts in a case properly within its jurisdiction. *See id.* at 438 (applying act of state doctrine even though foreign state had waived immunity).

In response, the State Department issued a letter announcing a policy "to relieve American courts of any restraint upon the exercise of their jurisdiction *to pass upon the validity of the acts of Nazi officials*." Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the Plaintiff in Civil Action No. 31-555 in the U.S. District Court for the Southern District of New York (Apr. 13, 1949) (emphasis added), *reprinted in Bernstein*, 210 F.2d at 376. Thus, the *Bernstein* letter concerned *solely* the act of state doctrine. *See* Letter from Legal Advisor Monroe Leigh to the Solicitor General (Nov. 26, 1975) (characterizing the *Bernstein* letter as "advis[ing] that the *act of state doctrine* need not apply to a class of cases involving Nazi confiscations") (emphasis added), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 708 (1976). The letter did not purport to address the doctrine of foreign sovereign immunity, much less announce a policy to abrogate sovereign immunity in certain cases. Indeed, if the *Bernstein* letter were intended to carve out a new exception to immunity, it is very odd indeed that the selfsame author of that letter did not mention such an exception several years later when he wrote the Tate Letter, announcing the adoption of the restrictive theory of immunity.

5. The Ninth Circuit further concluded that Austria "could have had no reasonable expectation of immunity in a foreign court" because Austria had adopted the restrictive theory of immunity before 1952. Pet. App. 19a. It does not follow, however, that Austria would not have expected immunity in the United States. Whether a foreign state is entitled to immunity from suit in the United States has *never* depended on the law of the foreign state. For instance, the Tate Letter notes that Greece had adopted the restrictive theory in the 1920s. *See* 26 Dept. State Bull. at 984. Yet,

before 1952 Greece continued to receive immunity for commercial acts. *See, e.g., The Maliakos*, 41 F. Supp. 697 (S.D.N.Y. 1941) (Greek vessel granted immunity in action on contract to recover for cargo damage). And even under the restrictive theory, expropriation of private property constitutes a "sovereign" act. *See supra* at 15. Thus, the expropriation exception to immunity was first set forth in the FSIA, long after the United States had adopted the restrictive theory.

Because—in its view—Austria had no reasonable expectation of immunity in *any* foreign court, the Ninth Circuit held that applying the FSIA in this case would not have a retroactive effect because it would " 'affect only *where* a suit may be brought, not *whether* it may be brought at all.' " Pet. App. 20a (quoting *Hughes*, 520 U.S. at 951) (emphasis in *Hughes*). The FSIA, however, "does not merely allocate jurisdiction among forums." *Hughes*, 520 U.S. at 951. "Rather, it *creates* jurisdiction where none previously existed," and thus "speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* (emphasis in original). *See Verlinden*, 461 U.S. at 496-497 (FSIA "does not merely concern access to the federal courts[, but] * * * codifies the standards governing foreign sovereign immunity as an aspect of *substantive* federal law") (emphasis added). *See also Hwang*, 332 F.2d at 684 (FSIA's commercial activity exception, "by qualifying what previously had been the absolute immunity of foreign sovereigns, * * * 'creates jurisdiction where none previously existed' "). Thus, contrary to the Ninth Circuit's conclusion, applying the FSIA in this case would not " 'merely * * * regulate the secondary conduct of litigation,' " but rather " 'the underlying *primary* conduct of the parties.' " Pet. App. 20a (quoting *Hughes*, 520 U.S. at 951) (emphasis added).

Finally, the Ninth Circuit also held that, even if Austria had an expectation of immunity from suit for the acts alleged here, such an expectation "would be due no deference." Pet.

App. 21a. In the Ninth Circuit's view, the presumption against retroactivity only applies in cases involving contracts or other financial transactions, and not "in the context of a claim like the international takings violation at issue here." *Id.* The Ninth Circuit cited no authority for this novel theory, which is in fact directly contradicted by *Hughes*, *supra*, a case on which the Ninth Circuit relied. *See id.* at 20a. There, this Court held that the presumption against retroactivity applied even though the wrongful conduct at issue was fraud. *See* 520 U.S. at 945, 951. Because Austria's settled expectations are entitled to the same deference as any other, the Ninth Circuit erred in retroactively applying the FSIA to deny Austria of immunity in this case.

C. Retroactive Application of New Exceptions to Immunity Would Undermine This Nation's Diplomatic Relations and International Comity.

In addition to the unfairness that exists any time a party is subjected to retroactive liability, retroactive application of new principles of sovereign immunity would have severe consequences for this Nation's diplomatic relations. Japan's circumstances demonstrate why this is so. After World War II, the United States recognized that it would be impossible for Japan to make full reparation for the damage that its former military had caused. The United States was also determined not to repeat the mistakes of the Treaty of Versailles, whose onerous reparations provisions were believed to have led directly to the rise of fascism in Europe. Accordingly, the United States adopted a policy of resolving all Japanese war claims through government-to-government negotiations, with the goal of reintegrating Japan into the community of democratic nations without imposing crushing financial liability. *See generally Mitsubishi Materials Corp.* v. *Superior Court*, 2003 WL 22504961, at *5-*7 (Cal. Ct. App. Nov. 5, 2003); *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 946-947 (N.D.

Cal. 2000), *aff'd on other grounds*, 324 F.3d. 692 (9th Cir.), *cert. denied*, 124 S. Ct. 105 (2003).

The San Francisco Treaty was the culmination of this policy. The Treaty imposed significant financial obligations on Japan, which was required to forfeit substantial assets held by its government and nationals in formerly occupied territories and to meet various other obligations. But the Treaty also explicitly waived all claims "arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." 136 U.N.T.S. at 64, Art. 14(b). And the Treaty furthermore made clear that the claims of nationals whose countries were not able to sign the San Francisco Treaty (including China and Korea) would similarly be resolved through government-to-government negotiations. *Id.* at 50, Art. 4(a). As the D.C. Circuit has held, as a result of the Treaty

> Japan could not have expected to be sued in a court of the United States by either an Allied national or a Chinese or Korean national for a claim arising out of World War II because the Allied Powers had respectively waived the claims of their nationals and expressed a clear policy of resolving the claims of other nationals through government-to-government negotiation." [*Hwang*, 332 F.3d at 685.]

The policy embodied in the Treaty has been extraordinarily successful, as Japan has once again become a productive and peaceful member of the international community and one of this country's strongest allies.

Now, more than fifty years after the fact, plaintiffs have sought to use the United States courts to revisit and undo that policy by litigating war claims long ago resolved through diplomatic negotiation. To do so, they have sought to impose new principles of sovereign immunity retroactively to strip Japan's immunity from suit. But the diplomatic resolution of the war with Japan—which mandated government-to-

government negotiations rather than individual claims—was necessarily negotiated against the backdrop of the prevailing absolute immunity principles of the time and cannot be divorced from them. To now subject Japan to suit in the courts of this country based on new conceptions of immunity that did not exist before 1952 would disrupt the settled expectations of both Japan and the United States, and call into question the settlement of World War II that is the foundation of the enduring postwar alliance between those two nations.

The practical implications of the Ninth Circuit's rule would likewise disrupt international comity. That rule requires a court to hypothesize what position the State Department might have taken if a case had been brought against an a foreign nation in the aftermath of a conflict that ended long ago. *See also Abrams* v. *Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173, 187-188 (2d Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3154 (Aug. 19, 2003) (No. 03-284). The result is that a current case was decided against Austria—a friendly ally—based on the Ninth Circuit's speculation that the Truman Administration would not have approved immunity. As shown above, the proper resolution is to recognize that the absolute immunity prevailing before 1952 was, in fact, absolute. But to the extent there is any question regarding the application of pre-1952 law to a current case, those questions should be resolved based on the Executive's understanding of our Nation's current relations with a foreign government and the effect of a current lawsuit on that international comity—not on judicial conjecture about our relations with a former regime years ago. *Cf. Princz*, 26 F.3d at 1174 n.1 (declining to create new immunity exception because "[i]n many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is"):

II. IF THE COURT HOLDS THAT AUSTRIA IS NOT ENTITLED TO IMMUNITY, THE COURT SHOULD CAREFULLY LIMIT ITS HOLDING TO THE FACTS OF THIS CASE.

As noted, the D.C. Circuit recently held that the commercial activity exception does not apply retroactively to acts occurring before 1952 and that Japan was thus entitled to immunity for acts occurring during World War II. *See supra* at 3. In so holding, the court specifically distinguished its decision from the Ninth Circuit's decision in this case, holding that "[w]e do not find [the Ninth Circuit's] reasoning applicable to this case." *Hwang*, 332 F.3d at 684. For the reasons set forth above, the Ninth Circuit erred in holding that Austria was not entitled to immunity in the circumstances of this case. Nevertheless, in the event this Court affirms the Ninth Circuit's ruling—and it should not—the Court should make clear that such reasoning does not apply in different circumstances such as those involving Japan.

First, the 1951 San Francisco Treaty expressly extinguished "all * * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." 136 U.N.T.S. at 64, Art. 14(b). As the D.C. Circuit explained, the treaty "embodies the foreign policy determination of the United States that *all* claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements." *Hwang*, 332 F.3d at 684 (quotation omitted; emphasis added). Thus, the retroactive application of the FSIA to claims arising out of any actions taken by Japan during World War II would clearly upset Japan's settled expectations, regardless of its effects on the expectations of other nations.[4] In distinguishing the Ninth

[4] In fact, the D.C. Circuit's ruling on the meaning and effect of the San Francisco Treaty provides a separate alternative basis for the court's holding, in addition to foreign sovereign immunity.

Circuit's decision below, the D.C. Circuit concluded that "there was no similar treaty with Germany or Austria, and therefore no similar settled expectation." *Id.* at 685.[5]

Second, the decision below involves the expropriation exception, whereas *Hwang* involves the commercial activity exception. The Ninth Circuit held that the expropriation exception applied retroactively in this case in part because—in its view—the *Bernstein* letter announced a policy to strip Austria of immunity for Nazi expropriations of private property. *See* Pet. App. 16-18a. Although Japan believes that the Ninth Circuit's reliance on the *Bernstein* letter was erroneous for the reasons discussed above, *see supra* at 18-20, as the D.C. Circuit has held there is no "similar statement of policy regarding the alleged acts of Japan." *Hwang*, 332 F.3d at 685. As the D.C. Circuit furthermore observed, "[t]he lack of such a statement not only distinguishes this

[5] The United States did enter into treaties with Germany and Austria providing for the restitution of certain confiscated property. *See, e.g.*, State Treaty for the Reestablishment of an Independent and Democratic Austria, 6 U.S.T. 2408, 2435-36, Art. 26 (May 15, 1955) (providing for return by Austria of all property confiscated on account of the racial origin or religion of the owner); Convention on the Settlement of Matters Arising out of the War and the Occupation, 6 U.S.T. 4411, 4452-61 (Oct. 23, 1954) (providing for restitution of property by Germany to victims of Nazi oppression). Those treaties also embody the Executive Branch's foreign policy determination that such expropriation claims are matters to be resolved through government-to-government negotiations, not private litigation. *See American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2390 (2003) ("The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century"). Thus, although the San Francisco Treaty leaves no doubt that Japan's settled expectations would be disrupted by retroactive application of the FSIA, the retroactive application of the expropriation exception in this case would in fact upset Austria's settled expectations as well.

case from *Altmann*; it also gives us all the more reason to believe the Executive wanted to handle claims against Japan arising out of World War II solely at the level of inter-governmental negotiations." *Id.*

Finally, the Ninth Circuit relied in part on the fact that "Austria itself had adopted the restrictive theory" prior to 1952. Pet. App. 19a. As noted above, the Ninth Circuit erred in relying on foreign law, which has never been relevant in determining whether to grant sovereign immunity. *See supra* at 20. Nevertheless, the same document that establishes that Austria had adopted the restrictive theory before 1952—the Tate Letter—also makes clear that by that time Japan had not. *See* 26 Dept. State Bull. at 984. As the Tate Letter notes, in 1952 Japan still adhered to the absolute theory of immunity. Thus, to the extent the retroactivity of the FSIA's immunity exceptions turns whether a nation had adopted the restrictive theory before 1952, that factor requires non-retroactivity with regard to Japan.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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